86-232

Supreme Court, U.S.
FILED
AUG 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

KENNETH W. BEHREND and
ELIZABETH M. BEHREND,

Petitioners,

v.

DONALD ZIEGLER,

Respondent

KENNETH W. BEHREND,

Petitioner,

v.

CRAIG McKAY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Kenneth W. Behrend
1320 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

August 12, 1986

95 pp

The petitioners, Kenneth W. Behrend and Elizabeth M. Behrend pray that a writ of certiorari issue to review the final judgment order of the United States Court of Appeals for the Third Circuit entered in these proceedings on May 14, 1986.

QUESTIONS PRESENTED

1. Is judicial immunity to be given to a District Judge who, in the management of litigation, knowingly acts contrary to the prohibitions of an Act of Congress, 38 U.S.C. 211?

2. Under the facts asserted herein, did the District Court Judge commit acts non-judicial in nature and did he act in the clear absence of jurisdiction so that under Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099 (1978) and Bradley v. Fisher, 80 U.S, (13

WALL) 335 (1872), immunity should not be granted?

3. Does a conflict, the consequences of which are likely to recur in the future, exist between the ninth circuit and the third circuit, in that the ninth circuit holds that a Judge who knowingly acts contrary to a prohibitory statute is said to act in the clear absence of all jurisdiction, while the third circuit grants immunity in such circumstances?

4. Under the facts asserted herein, should the Court exercise its power of supervision and require the District Court Judge to be accountable for his actions by not granting judicial immunity?

5. May an Assistant United States Attorney be granted immunity when he acts contrary to the Code of Professional Responsibility by corresponding and communicating directly with a party represented by a lawyer without the consent of the party's lawyer?

TABLE OF CONTENTS

Questions Presented..... i

Table of Contents..... iv

Table of Citations..... v

Citation to Opinions Below..... 1

Statement of Jurisdiction..... 2

Statutes Involved..... 3

Statement of the Case..... 4

Argument..... 16

Conclusion..... 27

Certificate of Service..... 28

Appendix

Opinion and Order of the District Court..... 1a

Opinion and Order of the Third Circuit Court of Appeals..... 34a

Opinion of District Judge Donald Ziegler, January 18, 1982..... 40a

TABLE OF CITATIONS

CASES

Araujo v. Welch,
742 F. 2d 802 (3d Cir. 1984)..... 25, 26

Bradley v. Fisher,
80 U.S. (13 WALL) 335 (1872)..... i, 18, 19, 24

Rankin v. Howard,
633 F.2d 844 (9th Cir. 1980)..... 18, 21

Sargarese v. Veterans Admin.,
415 F.2d 326 (3d Cir. 1969)..... 5

Stump v. Sparkman,435 U.S. 349,
98 S. Ct. 1099 (1978)..... i, 18, 19, 24

STATUTES

28 U.S.C. 1442(a)..... 2

28 U.S.C. 1446(d)..... 2

28 U.S.C. 1254(1)..... 2

38 U.S.C. 211..... i, 3, 17

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania, dated August 6, 1985, is reproduced in the Appendix to the Petition at page 1(a).

The opinion of the United States Court of Appeals for the Third Circuit, dated April 15, 1986, is reproduced in the Appendix to the Petition at page 32a.

The petitioner's Petition for Rehearing was denied by the Third Circuit Court of Appeals on May 14, 1986

JURISDICTION

Jurisdiction in the United States District Court was based upon 28 U.S.C. 1442(a) and 28 U.S.C. 1446(d).

The Court of Appeals for the Third Circuit, after denying oral argument, entered its opinion and order on April 15, 1986, and on May 14, 1986 denied the Petition for Rehearing.

Jurisdiction in the Supreme Court of the United States is invoked by the petition pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

38 U.S.C. 211(a) Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under Chapter 37 of this title, the decisions of the Administrator on any questions of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependants or their survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamous or otherwise.

STATEMENT OF THE FACTS

In a Federal Tort Claim Act proceeding, the District Court Judge entered into a secret understanding unknown to your petitioner with the petitioner's client. The terms of the understanding were that if the client would accept the cash amount offered in settlement by the United States, the judge would limit your petitioner's attorney's fees and expenses and order the Veteran's Administrator to provide medical services for the client.

The item critical to the client's acceptance of this agreeement was the promise of guaranteed medical care for his severely burned trachea. The ordering of such care was beyond the judge's jurisdiction to promise. He was forbidden to make such a promise or any such

subsequent order by the Congressional enactment of 38 U.S.C. 211, which prohibits any judge from having any power over the Veterans Administrator with respect to medical care. The judge knew of this limitation to his jurisdiction because earlier in the case he refused the client's request for improved care, (which request he labeled as "frivolous"), by citing the same 38 U.S.C. 211, and the case of Sargarese v. Veterans Administration, 415 F. 2d 326 (3d Cir. 1969) as the reasons for his absence of authority over the Veterans Administrator.

The client, Alton Godwin, died on February 13, 1985, without ever having the practical ability to obtain excellent quality civilian doctor and hospital care. Your petitioner opposed the settlement sponsored by the District Court Judge

because, in all practicality, it limited the client to Veterans Administration medical services without tracheal replacement ability and further because the receipt of even these services could not be enforced by the Court. Your petitioner was insisting that a settlement be entered into in which a fund would be set aside for the client to utilize to obtain superior civilian doctor and hospital services as he might require and request them.

To still the opposition of your petitioner, the District Court Judge threatened your petitioner with criminal prosecution and disciplinary action. Nevertheless, your petitioner opposed the judge, accusing him of misleading the client. As a result of these threats the judge did extract a statement from you

petitioner that was held to be a waiver of fees and expenses. However, the judge did make an order informing your petitioner that his expenses could be determined at a later time but that your petitioner was ordered "to refrain from pressing any claim or demand in any court against plaintiffs for any fee, expense or cost unless otherwise authorized by the court." However, he never intended to act upon this order. When he was requested to, he refused to. The judge said that his refusal to permit the payment of expenses which had been incurred was a punishment sanction against your petitioner. The judge pretended that he was punishing your petitioner because he was seeking to charge an excessive fee when in reality the Judge's purpose was to intimidate and cause harm to your petitioner and to persuade the client not to try to upset an

agreement that was not in the client's best interest and not in the the best interest of his health and longevity.

The understanding entered into between the District Judge and your petitioner's clients was accomplished on a Friday preceding the trial scheduled for the following Monday. It was initiated during a direct telephone conversation between the Judge and the clients without your petitioner's knowledge or presence. Previously, the District Court Judge had informed the clients that if the settlement offer was not accepted by them, it was certain that they would not qualify for future Veterans Administration benefits, and that the amount that he would award in this non-jury case would not be enough to pay for the client's future medical expenses without such benefits. Immediately following their

conference with the judge, the clients called their attorney, your petitioner, and told him that, contrary to their decision reached earlier that same day, they had decided not to proceed to trial. They did not disclose that they had talked with the Judge, but gave the excuse that they were afraid to appear at trial. The Judge's office remained silent Friday, Saturday and Sunday about the understanding reached with the client. Neither the client nor the judge during those three days informed your petitioner of their understanding.

During a conference held the following Monday, the judge, in spite of his earlier decision confirming his lack of jurisdiction over the Veterans Administrator, assured the clients that his proposed continuing control over the Veterans Administrator would be enforced

by him personally. In response to your petitioner's protests as to his lack of jusidiction, he stated that "I don't recognize that at all, and I believe I have jurisdiction to enforce this clause. In no event shall the quality of medical care and treatment that has been provided Alton Godwin to date be diminished or compromised. And if there is any violation of that provision in the future, you may call it to my attention, and I will see that that provision is enforced without charge to you. Further, I will enforce the provision in the stipulation for settlement that provides that the Veterans Administration will provide your husband with medical care as it has been doing in the past. If you have some problems with regard to that you should bring it to this Court's attention." The Judge later went on to say "No one in the

Veterans Administration can make you pay anything. Their door will be open to medical care without a fee for the rest of Mr. Godwin's life, and he can go there as he has been going there and receive medical care free of charge." The Judge then entered a consent judgment order of the settlement agreement which required the Veterans Administrator to provide care of a specific kind for the client's lifetime.

The District Court Judge then assumed the duty of performing le al research and providing legal advice for the clients, when he assured them that he had looked into the previously filed State Court claims of their children, and informed the clients that "I conclude that under Pennsylvania law there is no basis for recovery by the children for the injury sustained by Mr. Godwin." The

clients were therefore led to assume that the forced settlement of those claims through the proposed settlement stipulation would have no effect on their children.

The District Judge not only assumed the role of the clients' attorney and legal advisor, but of their medical advisor and social worker as well. Your petitioner had consistently called for a suitable sum of money to be reserved in order that Mr. Godwin could have the benefit of restorative care rather than the maintenance care he had been receiving. Such restorative care was available from private hospitals outside the Veterans Administration system. Your petitioner's assertions that such care was available and should be attempted were rejected by the Judge, who decided that the maintenance care being provided was

sufficient and should be continued and if the client needed any counseling that he was available to help enforce the provision of such care.

Throughout these proceedings, the Assistant United States Attorney, Craig McKay, echoed the Judge's sentiments, and likewise assumed the role as legal advisor to the clients by writing and communicating with them directly and without the knowledge or presence of your petitioner. Both the judge and the Assistant United States Attorney assured the clients that they would assist them with whatever problems they might have in the future, including the payment of their attorney's fees or disputes with their medical providers.

Given such assurances of apparent lifetime concern and aid upon request, the clients terminated their relationship with

their chosen attorney, your petitioner, and instead sought advice and counsel directly from the District Court Judge and from their own adversary, the defense attorney, the Assistant United States Attorney.

Your petitioner filed suit against both the District Judge and the Assistant United States Attorney for compensatory damages for the tortious interference with a professional relationship, intentional infliction of emotional harm, outrageous conduct, and fraudulent misrepresentation.

District Court Judge John F. Gerry agreed with the defendants that their actions should be given immunity, but that the plaintiff's belief to the contrary was not patently unreasonable. The Circuit Court of Appeals for the Third Circuit agreed with the defendants, said that the plaintiffs case was frivolous, and awarded

costs and attorneys fees to the defendants.

By way of addendum, the District Court Judge also vilified your petitioner in a written opinion based on incorrect facts not obtained from a hearing or other due process proceeding and made unjustifiable inferences. (40a)

Further, the District Court Judge and the Assistant United States Attorney have permitted their counsel to make personal attacks on your petitioner. They have permitted their counsel to make false statements about your petitioner and when they are shown to be false, not to correct them. Further, the District Court Judge allows his personal attack and vilification opinion to stand without correction or apology.

REASONS FOR GRANTING THE PETITION

> "Were the power of judging joined with the legislative, the light and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator. Were he joined to the executive power, the judge might behave with all the violence of an oppressor."

This quotation is attributed to James Madison in the Federalist Papers found at the Federalist 47, at 338 (B. Wright ed. 1961).

Judicial immunity has been granted to the District Court Judge by the Court of Appeals for the Third Circuit.

The authority of a District Court Judge other than his necessary inherent power is given by statute and he does not have broad general jurisdiction such as a state court judge of general jurisdiction.

1. JUDICIAL IMMUNITY IS NOT TO BE GIVEN TO A DISTRICT COURT JUDGE WHO, IN THE MANAGEMENT OF LITIGATION, KNOWINGLY ACTS CONTRARY TO THE PROHIBITIONS OF AN ACT OF CONGRESS, 38 U.S.C. 211.

The authority, power, and jurisdiction of the District Court vis-a-vis the Veterans Administrator is described and prohibited in 38 U.S.C. 211(a) which says "On and after October 17, 1940, ... the decision of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependants or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

The District Court Judge knew of this limitation on his powers. He had

used the statute earlier in the case to deny improved medical care requested by the client of the Veterans Administration. Even with these limitations and the District Court Judge's knowledge of them, he, nevertheless, informed the clients that he had the power to enforce an order requiring the Veterans Administrator to perform, and entered an order giving effect to a settlement agreement which required the Veterans Administrator to provide medical services of a specific kind for the lifetime of the client.

These were acts done in the clear absence of all jurisdiction under the holding of Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1683 (1978); Bradley v. Fisher, 80 U.S. (13 WALL) 335 (1872); and Rankin v. Howard, 633 F. 2d 844 (9th Cir. 1980), cert denied, 451 U.S. 939, 101 S. Ct. 2020 (1981). These acts were done to

create a tool to be used to cut into the relationship of the client and his lawyer to the harm of both the client and his lawyer and to the harm of our system of adversarial jurisprudence. The judge manipulated the clients to accept the settlement proposed by the United States through his prestige and knowing mistatement of authority and through the entry of an order in the absence of jurisdiction to do so.

2. UNDER THE FACTS ASSERTED HEREIN, THE DISTRICT COURT JUDGE COMMITTED ACTS NON-JUDICIAL IN NATURE AND HE ACTED IN THE CLEAR ABSENCE OF ALL JURISDICTION SO THAT UNDER STUMP V. SPARKMAN, 435 U.S. 349, 98 S. CT. 1099 (1978) AND BRADLEY V. FISHER, 80 U.S. (13 WALL) 335 (1872), IMMUNITY SHOULD NOT BE GRANTED.

It is asserted, as has been described, that the District Court Judge acted in the clear absence of all jurisdiction when he assumed authority over the Veterans Administrator to direct

the supplying of medical services. In addition, it is asserted that he committed non-judicial acts: when he held a secret conference and entered into an understanding with the clients; when he became the clients' attorney to persuade them to enter into a settlement over their lawyer's objections; when he told the clients that if they did not take the settlement offered he, as judge and jury of the case, would not award enough money for continuing medical care; when he gave legal advice as to the legal viability of their children's state court claims; when he threatened your petitioner with professional and criminal wrongdoing; and when he offered opinions as to his authority to control, direct and order the Veterans Administrator in any future dispute as to medical care.

These acts are not consistent with

the judicial function and his offering of opinions as to the results of possible future cases or controversies between the clients and the Veterans Administrator are violations of Article III of the Constitution of the United States.

3. A CONFLICT, THE CONSEQUENCES OF WHICH ARE LIKELY TO OCCUR IN THE FUTURE, EXISTS BETWEEN THE NINTH CIRCUIT AND THE THIRD CIRCUIT, IN THAT THE NINTH CIRCUIT HOLDS THAT A JUDGE WHO KNOWINGLY ACTS CONTRARY TO A PROHIBITORY STATUTE IS SAID TO ACT IN THE CLEAR ABSENCE OF ALL JURISDICTION, WHILE THE THIRD CIRCUIT GRANTS IMMUNITY IN SUCH CIRCUMSTANCES.

We quote Rankin v. Howard, 633 F. 2d 844, 849 (9th Cir. 1980) cert. denied, 451 U.S. 939, 101 S. Ct. 2020 (1981): "But when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost."

Despite the District Court Judge's

knowledge of the prohibitions of 38 U.S.C. 211(a), and his subsequent acts contrary to it, the Circuit Court of Appeals for the Third Circuit granted him immunity. It is asserted that there is a patent conflict existing between the Ninth and the Third Circuit Court of Appeals.

4. UNDER THE FACTS ASSERTED HEREIN, THE COURT SHOULD EXERCISE ITS POWER OF SUPERVISION AND REQUIRE THE DISTRICT COURT JUDGE TO BE ACCOUNTABLE FOR HIS ACTIONS BY NOT GRANTING IMMUNITY.

Nature abhors a vacuum. Nature not only abhors a physical vacuum, it seems to abhor a political, social and economic vacuum. A contemporary example of this phenomenon is the medical malpractice litigation today. After many years, the doctors' conspiracy of silence has been broken. Today we have docket choking litigation, some of it unwarranted, but believed to be proper by many because doctors have lost a substantial amount of

their credibility by their refusing to acknowledge wrongdoing and police their own ranks.

The standard of excusing a judge for all of his actions save that of crime or violence is not a standard consistent with our inborn, inbred, taught, extolled and accepted national standard of fairness. It is suggested that the concept of non-accountability for a judge by not permitting the airing of and action on just grievances will inevitably invite the attention of the legislative or executive branches.

The only method available to seek to right egregious judicial wrongs to an injured individual is the law suit. It is asked that your Honorable Court consider that other than gentlemanly persuasion, the only way to cause a District Court Judge to respect the power of supervision

is to require accountability on some basis other than crime or violence.

The present standard of judicial accountability, that of acts done in the absence of jurisdiction pronounced by Stump v. Sparkman and Bradley v. Fisher in practice seems to say that immunity is granted because once a judge dons his robes in a case, he is not accountable except for crime or violence. It is urged that your Honorable Court look with an eye to the future, rather than rely on the somewhat mechanistic, possibly illusory, past precedent.

5. AN ASSISTANT UNITED STATES ATTORNEY SHOULD NOT BE GRANTED IMMUNITY WHEN HE ACTS CONTRARY TO THE CODE OF PROFESSIONAL RESPONSIBILITY BY CORRESPONDING AND COMMUNICATING DIRECTLY WITH A PARTY REPRESENTED BY A LAWYER WITHOUT THE CONSENT OF THE PARTY'S LAWYER.

The District Court, in granting to the defendant Summary Judgment and the

Court of Appeals for the Third Circuit, in upholding that decision, has established that the Assistant United States Attorney involved here was entitled to absolute official immunity. In making this determination, the court has relied upon the standard set forth in Araujo v. Welch, 742 F. 2d 802 (3d Cir. 1984). Araujo is a case involving a government official who was otherwise immune from suit, but who lost that immunity through an act of physical violence. By leaning so heavily on the Araujo case and accepting it as the standard to be used, the Court has apparently established that the outer perimeters of an official's duties which are to be protected by immunity end only at an act of assault and battery.

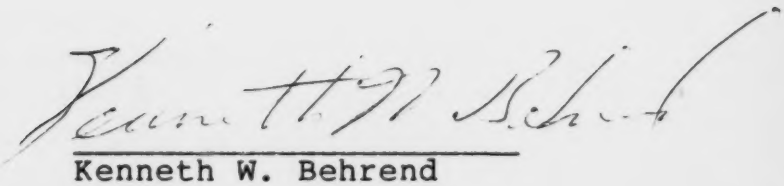
It is asserted that the actions of an Assistant United States Attorney which are subject to the protection of immunity

should be judged according to the same standard that all other practicing attorneys must follow, that being the Code of Professional Responsibility. This Code is the means by which attorneys define their responsibilities and police their own ranks, but such responsibilities and enforcement do not extend to attorneys working for the government when the Araujo standard is accepted as controlling.

In the consideration of what limits to set, we must remember that we are not talking about or considering prosecutorial immunity, but only that of a lawyer as counsel in a civil suit for damages. It should be noted This problem of defining the limits of official immunity has not been previously defined by your Honorable Court.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should issue a Writ of Certiorari to the Court of Appeals for the Third Circuit.



Kenneth W. Behrend

AFFIDAVIT OF SERVICE

I hereby certify that three true and correct copies of this Petition for Writ of Certiorari were mailed, postage prepaid, this 12th day of August, 1986, to the following adverse counsel:

Mr. Anthony Mariani
633 U.S.P.O. & Courthouse
Pittsburgh, PA 15219

Kenneth W. Behrend

Sworn to and subscribed
before me this 11th day
of August, 1986

BARRY W. FENTON, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES DEC. 12, 1988

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KENNETH W. BEHREND,	:	
	:	
Plaintiff,	:	
v.	:	C.A. No. 85-0016
	:	
CRAIG McKAY,	:	
	:	
Defendant	:	

KENNETH W. BEHREND and ELIZABETH M. BEHREND,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C.A. No. 85-0017
	:	
DONALD ZIEGLER,	:	
	:	
Defendant	:	

OPINION

APPEARANCES:

Kenneth W. Behrend, Esquire
1320 Grant Building
Pittsburgh, Pennsylvania 15219

Plaintiff Pro Se

Anthony M. Mariani, Esquire
Assistant U.S. Attorney
633 U.S.P.O. & Court House
Pittsburgh, Pennsylvania 15219

Attorney for Defendants Craig McKay and Donald Ziegler

GERRY, District Judge
(Sitting by designation as Judge of the Western District of Pennsylvania)

These two related tort actions arise out of events which occurred in the course of settling the case of Alton Godwin and Karen Godwin v. Victor Schramm. Plaintiff Kenneth W. Behrend is an attorney from Pittsburgh who had represented the Godwins in their tort action to recover for personal injuries allegedly caused by the negligence of Veterans Administration physicians in performing laser surgery on Mr. Godwin. Defendant Craig McKay (Civil No. 85-0016) is an Assistant United States Attorney for the Western District of Pennsylvania. He was counsel of record for the United States in the Godwin litigation. Defendant Donald Ziegler (Civil No. 85-0017) is a United States District Judge for the Western District of Pennsylvania. Judge Ziegler presided over the Godwin litigation.

The Godwin case never came to trial. Instead, a Stipulation of Compromise Settlement was executed between the Godwins and the United States. The Stipulation provided for payment by the United States to the Godwins of $1,125,00.00 In addition, the United States, through the Veterans Administration, agreed to provide medical treatment to Alton Godwin for the rest of his life, free of charge. By order of the court, the law firm of Behrend, Aronson and Morrow was to receive a counsel fee of $281,250.00, or 25 percent of the $1,125,000.00 award. Shortly after the stipulation was signed, the Godwins discharged plaintiff as their attorney.

In the two actions before the court, plaintiff Kenneth W. Behrend (his wife, Elizabeth M. Behrend is a co-plaintiff in Civil No. 85-0017) seeks to

recover for alleged improprieties which occurred during the settlement process. Plaintiff's complaint in Behrend v. McKay, Civil No. 85-0016, contains one count. It alleges that beginning December 13, 1982, Mr. McKay caused the Godwins to terminate their employment of plaintiff on behalf of themselves and their children with regard to their claims against the United States, Stanley Dale MacMurdo, Eye and Ear Hospital of Pittsburgh, and Cavitron Corporation, thereby allegedly causing plaintiff to lose reimbursement of costs, expenditures of litigation and fees. In Behrend v. Ziegler, Civil No. 85-0017, plaintiffs Kenneth and Elizabeth Behrend have filed a five count complaint against Judge Ziegler. The complaint asserts the following five claims: (1) tortious interference with professional relationship; (2) intentional infliction

of emotional distress; (3) loss of consortium; (4) outrageous conduct; and (5) fraudulent representation. Counts 1, 2, and 5 are brought on behalf of Kenneth W. Behrend; counts 3 and 4 are brought on behalf of Elizabeth M. Behrend. Here, too, plaintiffs seek both compensatory and punitive damages.

I. Behrend v. McKay

On January 22, 1985, Mr. McKay filed a Motion for More Definite Complaint. In response thereto, plaintiff, on February 5, 1985, served Mr. McKay with his complaint.

Plaintiff's complaint contains one count. It alleges that beginning December 13, 1982, Mr. McKay caused the Godwins to terminate their employment of plaintiff on behalf of themselves and their children with regard to their claims against the United States, Stanley Dale MacMurdo, Eye

and Ear Hospital of Pittsburgh and Cavitron Corporation, thereby allegedly causing plaintiff to lose reimbursement of costs, expenditures of litigation and fees. Plaintiff demands both compensatory and punitive damages.

This case is presently before the court on a motion by defendant McKay to dismiss plaintiff's complaint or, in the alternative, for summary judgment on that complaint. In addition, the defendant moves for an award of reasonable attorney's fees, expenses and costs.

The defendant's first contention is that to the extent that the suit is brought against McKay in his official capacity as Assistant United States Attorney, it is barred by the doctrine of sovereign immunity. The Federal Tort Claims Act, 28 U.S.C. sec. 2671 et seq. is "the exclusive waiver of sovereign

immunity for actions sounding in tort against the United States, its agencies and/or officers acting in their official capacity." J.D. Pflaumer v. U. S. Dept. of Justice, 450 F. Supp. 1125, 1132, n.11 (E.D. Pa. 1978). Section 2675 of the Federal Tort Claims Act (FTCA) requires submission of an administrative claim for damages in federal court. This requirement is jurisdictional and cannot be waived. Bialowas v. United States, 443 F.2d 1047, 1049 (3d Cir. 1971). Plaintiff concedes that he did not submit his claim to an administrative agency, and that a suit against Mr. McKay in his official capacity would be barred. However, plaintiff argues in his responsive brief that this is irrelevant since he intends to proceed against McKay in his individual capacity only.

Although plaintiff asserts that the

suit is brought against McKay solely in his individual capacity, the court is not certain that plaintiff can characterize his action in this way. The actions which plaintiff ascribes to defendant were all undertaken in connection with McKay's handling of the Godwin litigation. Even if McKay mishandled the litigation, it is not clear how his actions thereby fall outside the scope of his official capacity. Thus, it is arguable that the plaintiff's entire action should be barred for failure to comply with the jurisdictional prerequisites of the FTCA described above. Assuming, however, that the Tort Claims Act does not bar the whole suit, the court believes that McKay is nonetheless shielded from liability under the doctrine of absolute official immunity.

In Barr v. Matteo, 360 U.S. 571

(1959), the United States Supreme Court recognized the immunity from suit for common law torts of federal public officials. The Third Circuit very recently re-examined the applicability of this doctrine in Araujo v. Welch, 742 F.2d 802 (3d Cir. 1984). According to Araujo, absolute official immunity shields federal officials from liability on common law tort claims where two prerequisites are satisfied:

> (1) the federal official's actions have a policy-making or judgmental element, i.e., they are discretionary rather that ministerial; and
>
> (2) the allegedly wrongful acts fall within the outer perimeter of the defendant-official's duties

With respect to the first requirement, the court finds that the actions of a government attorney in the course of conducting civil litigation on behalf of

the government are clearly discretionary rather than ministerial. See Aronson v. United States, 595 F. Supp. 178, 181 (E.D. Pa. 1984). The difficulty comes in applying the second prong of the test.

The plaintiff's theory of the case is that defendant McKay tortiously interfered with Behrend's relationship with his clients, thereby alienating them from him. Behrend asserts that defendant induced the Godwins to terminate their employment of plaintiff in their suits against the United States, Stanley Dale MacMurdo, the Eye and Ear Hospital of Pittsburgh and the Cavitron Corporation. In his opposition papers, Mr. Behrend explains the factual basis for these allegations. He cites three separate acts of McKay which he contends fall outside the outer perimeters of McKay's official duties in the Godwin case and therefore

outside the scope of official immunity. First, he refers to Mr. McKay's alleged statement that the Godwins could contact him in the future if they had any problems with the Veterans Administration under the proposed settlement. Second, plaintiff points to McKay's sending to the Godwins a copy of his December 21, 1982 letter to Judge Ziegler, which says that "[i]t is important that the Godwins let me know immediately as to what annuity suits their needs." (Exhibit A to plaintiff's affidavit.) Third, plaintiff argues that Mr. McKay returned Mrs. Godwin's telephone call to him on December 23, 1982, and that later in the same day the Godwins severed their relationship with Mr. Behrend by telegram. According to plaintiff's theory, this behavior placed McKay in the position of acting as attorney for the Godwins and encouraged the Godwins to deal

with McKay rather than through their chosen legal representative, Mr. Behrend.

Assuming as we must for purposes of the motion that the facts are as plaintiff Behrend believes them to be, the court nonetheless finds that defendant McKay is entitled to summary judgment based on applicability of absolute official immunity. The actions which plaintiff claims that McKay took -- writing letters, answering phone calls, conversing with an adverse party -- all arose out of and were related to the Godwin litigation. Plaintiff does not dispute that McKay was acting within the scope of his authority in negotiating and discussing the terms of the settlement agreement. (Plaintiff's brief at p. 8.) Nor has the plaintiff argued that defendant's contact with the Godwins was unrelated to this case. It follows from this, the court believes,

that McKay should be shielded by official immunity from liability stemming from statements that he made during the course of negotiations. The scope of a federal officer's duties or jurisdiction is to be construed broadly so as to effectuate the purposes of absolute immunity. See Simons v. Bellinger, 643 F.2d 774, 786 (D.C. Cir. 1980); Burda v. National Ass'n. of Postal Supervisors, 592 F. Supp. 273, 278 (D. D.C. 1984). As the Third Circuit reiterated last year in Araujo, the proper approach is to consider the precise official function at issue and to determine whether an official is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct. Araujo, 742 F.2d at 805. If an action is "more or less" connected with the general matters committed by law to the official's control

or supervision, then it falls within the perimeter of his duties for immunity purposes. Araujo, 742 F2d at 805, citing Johnson v. Alldredge, 488 F.2d 820, 824 (3d Cir. 1973), interpreting Barr v. Matteo. Put another way, the immunity of an official is dependant not upon the legality of his action but upon its having sufficient connection with his duties that the official could reasonably believe his action authorized. Johnson v. Alldredge, 488 F.2d at 826. There is no evidence before the court that Mr. McKay was not authorized to conduct the Godwin litigation or that his actions were unrelated to that litigation. In addition, the ability of government attorneys to conduct litigation and to ensure the effective negotiation and enforcement of settlements would be severely hampered if they could be

subjected to liability in tort for statements made in connection with their work.

For all these reasons, the court concludes that defendant McKay must be shielded from liability by the application of official immunity, and that summary judgment must be entered in his favor.

Having determined that the plaintiff's action against defendant McKay cannot succeed, the court must next proceed to the defendant's motion for an award of reasonable attorney's fees and costs. Where, as here, the defense of a federal official is provided at the expense of the United States, the United States itself may seek attorney's fees, expenses and costs. Moon v. Smith, 523 F. Supp. 1332 (E.D. Va. 1981). The government argues that an award is warranted in the instant action because

plaintiff's claims are patently frivolous and have been brought and maintained vexatiously and in bad faith. This court's entry of summary judgment in defendant's favor demonstrates our agreement that the plaintiff's case is without merit. Nonetheless, on the record before us at this juncture, the court is unable to agree with the defendant's assertion that "plaintiff's recent submissions clearly evidence not only frivolousness, but also vexatiousness and bad faith ...." (Defendant's brief at p. 21) It is true that plaintiff may have been less than forthright in framing his pleadings.1 Standing alone, however, this

1. For example, plaintiff's complaint identifies the defendant as a citizen of Pennsylvania but does not mention that he is an Assistant United States Attorney or that the alleged operative facts of this action occurred in the context of another lawsuit in which plaintiff and defendant represented adverse parties.

is an insufficient basis upon which to award fees and costs. The authority to assess attorney's fees should be exercised with restraint. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980). The standards for finding bad faith are necessarily stringent. Lipsig v. National Student Marketing Corp., 663 F. 2d 178, 180 (D.C. Cir. 1980). In the instant case, the defendant has not shown that plaintiff's claim is asserted "wantonly, for purposes of harassment or delay or for other improper reasons." Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977). While defendant argues in his brief that plaintiff's claim rests on "unfounded assertions and accusations" and that his pleadings contain "factual misrepresentations" (defendant's brief at 24-25), these allegations go largely

unsubstantiated. Furthermore, while the 1983 amendments to F. R. Civ. P. 11 allow for an award of fees and costs in a broader range of cases than under the "good faith" standard, the courts applying that rule are to avoid using the wisdom of hindsight and are to test the conduct of the attorney bringing an action by inquiring into what was reasonable to believe at the time the pleading was filed. Advisory Committee Note to the 1983 Amendments, 97 F.R.D. 165, 199 (1983).

Although the court agrees with the defendant that his actions fell within the protection of his official immunity, plaintiff's belief to the contrary was not so patently unreasonable as to warrant an award of fees and costs. Accordingly, defendant's motion will be denied.

II. Behrend v. Ziegler

This case is presently before the court on a motion by defendant Ziegler to dismiss the plaintiffs' complaint or, in the alternative, for summary judgment on that complaint. In addition, the defendant moves for an award of reasonable attorney's fees, expenses and costs.

The thrust of the defendant's argument is that the plaintiff's claims are barred by the doctrine of judicial immunity. The plaintiffs concede that the principle of judicial immunity has had long standing application and that a judicial officer should be "free to act upon his own convictions without apprehension of personal consequences to himself." Bradley v. Fisher, 80 U.S (13 Wall.) 335, 347 (1872). Nonetheless, plaintiffs argue that Judge Ziegler's conduct here fell within the range of two

recognized exceptions to the applicability of judicial immunity. They assert that immunity does not attach in this case because (1) Judge Ziegler did not perform acts normally performed by judges and thus did not act in his judicial capacity; and (2) Judge Ziegler acted in the clear absence of all jurisdiction.

With respect to the first exception, plaintiffs contend that Judge Ziegler acted in a direct advisory role vis-a-vis Mr. Behrend's clients, the Godwins, in settling the case of Alton Godwin and Karen Godwin v. The United States, Civ. No. 81-856 (W.D. Pa.). The Behrends claim that by substituting himself for counsel of record and acting as an advocate in the course of settlement negotiations, Judge Ziegler was no longer performing an act normally performed by a judge. The relevant standard for

determining whether an act is a judicial one is set forth in Stump v. Sparkman, 435 U.S. 349 (1978). According to Stump, the factors to be considered are "the nature of the act itself, i.e., whether it is a function normally performed by a judge, and ... the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." Id. at 362. For the reasons set forth below, the court believes that application of the test enunciated in Stump leads to the conclusion that Judge Ziegler's alleged conduct was "judicial" and therefore within the scope of judicial immunity.

Plaintiffs first point to the events which allegedly took place during a meeting on December 9, 1982 in Judge Ziegler's chambers. Plaintiff Kenneth Behrend says that he had advised his clients to refuse a structured settlement

plan from the government which included a provision for lifetime medical care because it would not be enforceable. At that point Judge Ziegler, who was to sit as the trier of fact in the Godwins' non-jury case, allegedly told the Godwins that even if he gave them an award it would not be sufficient to cover all of Mr. Godwin's medical expenses at a civilian care facility. (K. Behrend affidavit of March 5, 1985 at paragraph 2.) The following day, December 10, 1982, Mrs. Godwin and Judge Ziegler allegedly had a conversation in which it was "agreed" between the judge and Mrs. Godwin that the Godwins would accept the government's offer. During a recorded conference on December 13, 1982, Judge Ziegler told the Godwins that "if there is any violation of that provision [for medical care and services] in the future, you may call it to my attention,

and I will see that that provision is enforced without charge to you." (Transcript of Proceedings of December 13, 1982 at p. 7). Finally, Kenneth Behrend contends that Judge Ziegler forced him to accept a counsel fee that the judge determined to be fair and caused the waiver of plaintiff's right to appeal the determination by having plaintiff state in a recorded session that he would abide by it. (Plaintiffs' memo of law at pp. 12-13).

Accepting the foregoing factual recitation as true, the court nonetheless disagrees with the plaintiffs' conclusion that Judge Ziegler's acts were "non-judicial." The statements supposedly made by Judge Ziegler all referred to certain aspects of the proposed settlement of the Godwin Litigation. The negotiation of a settlement is a judicial act. Petty v.

General Accident Fire & Life Assurace Corp., 365 F.2d 419, 421 (3d. Cir. 1966). The enforcement of those settlement agreements is also a proper judicial role. Hobbs & Co., Inc. v. American Investors Management, 576 F.2d 29, 33 (3d Cir. 1978). Furthermore, the attorney's fees to be paid out of a settlement fund are a proper subject of inquiry by the court in which the settlement is reached. Dunn v. H. K. Porter Co., 602 F. 2d 1105, 1108 (3d Cir. 1979). Accordingly, the nature of the acts undertaken by Judge Ziegler was inherently judicial. In addition, there can be no doubt that the expectation of the parties was that they were dealing with Judge Ziegler in his judicial capacity. Thus, under the two-prong standard of Stump v. Sparkman, the acts complained of were judicial and within the scope of immunity.

Plaintiffs next seek to invoke a second and closely related exception to the judicial immunity doctrine. They allege that Judge Ziegler acted "in the clear absence of all jurisdiction," thereby precluding the application of judicial immunity to his conduct. Stump, 435 U.S. at 357. The court disagrees. The affidavit submitted by Mr. Behrend himself undermines this contention. According to Mr. Behrend, "all of the facts sworn to herein arise concomitant with or as part of the settlement of Alton Godwin and Karen Godwin v. The United States (Civil Action No. 81-856)." (Behrend affidavit of March 5, 1985, p. 1.) Plaintiffs have offered no evidence or argument suggesting that Judge Ziegler lacked jurisdiction over the Godwin case. Instead, they cite three specific acts of Judge Ziegler which they claim are beyond

the judge's jurisdiction. These contentions are as follows: (1) Judge Ziegler acted in the clear absence of jurisdiction because under 38 U.S.C. section 211 he could not bind the Veterans Administration as he attempted to do in the settlement agreements; (2) he destroyed by the settlement any future claims by the Godwins against Cavitron, Eye and Ear Hospital and Dale MacMurdo, claims which were not properly before him; and (3) he rendered an advisory opinion when he entered an order stating that plaintiff shall refrain from suing the Godwins for a fee unless otherwise authorized by the court.

In view of the controlling case law, the court believes that the plaintiffs are urging us to adopt an unacceptably restricted interpretation of a judge's jurisdiction. The Supreme Court

has explicitly stated that "the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." Stump, 435 U.S. at 356. Thus, "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" Id. at 356-57. The court reiterated the venerable language of Bradley v. Fisher, which held that a judge was immune for his judicial acts even when such acts were performed in excess of his jurisdiction, so long as they were not performed in the clear absence of all jurisdiction:

> A distinction must be here observed between excess of

> jurisdiction and the clear absence of jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correcness of his interpretation in these particulars the validity of his judgments may depend.
>
> Bradley, 13 Wall. at 351-52.

In the present case, the actions attributed to Judge Ziegler, if they were erroneous at all, were at most "in excess" of his jurisdiction, rather than in the clear absence of it. Initially, the plaintiffs' reliance on 38 U.S. Section 211 is misplaced. That statute merely provides that federal courts shall not have jurisdiction to review decisions

of the Administrator of the Veterans Administration. Thus, at most it is arguable that, contrary to Judge Ziegler's apparent belief, he might lack jurisdiction to insist upon the terms of the settlement agreement if at some subsequent point the Veterans Administration decided to discontinue medical care for Mr. Godwin. However, this in no way deprived Judge Ziegler of subject-matter jurisdiction over the Godwin case itself and the right to assist negotiation of a settlement agreement terminating that case. Since the negotiation of the settlement agreement fell within the subject-matter jurisdiction of Judge Ziegler, so too did the provision in the agreement which called for a dismissal of the claims against Cavitron, Eye and Ear Hospital and MacMurdo. Finally, Judge Ziegler's

issuance of the restraining order was a proper exercise of jurisdiction. The All Writs Act, 28 U.S.C. Section 1561(a), empowers federal courts to enjoin the filing of lawsuits in appropriate circumstances. In re Oliver, 682 F.2d 443 (3d Cir. 1982). While that Act is not an independent source of jurisdiction, it may be invoked when another basis of jurisdiction exists. See United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). Because Judge Ziegler had jurisdiction over the Godwin litigation, including the issues of attorney's fees and costs, the restraining order was not entered in the clear absence of all jurisdiction.

In sum, the court rejects the plaintiff's assertion that Judge Ziegler committed non-judicial acts or that he acted in the clear absence of

jurisdiction. Consequently, Judge Ziegler is shielded from liability under the doctrine of judicial immunity and is entitled to summary judgment on all counts of the plaintiffs' complaint.

Having determined that the plaintiffs' action against defendant Ziegler cannot succeed, the court must next proceed to the defendant's motion for an award of reasonable attorney's fees and costs. The arguments advanced in support of this motion are the same as those advanced in support of an identical motion in the related case of Behrend v. McKa In this case, as in the McKay case, although the court agrees with the defendant that his actions fell within the protection of the applicable immunity doctrine, plaintiffs' belief to the contrary was not so patently unreasonable as to warrant an award of fees and costs.

Thus, for the reasons set forth above in our opinion in Behrend v. McKay, the defendant's motion for fees and costs will be denied.

The court will enter the accompanying order.

John F. Gerry, U.S.D.J.
Sitting by Designation
as Judge of the Western
District of Pennsylvania

Dated: August 6, 1985.

District Judge: Hon. John F. Gerry

Submitted Under Third Circuit Rule 12(6)

April 15, 1986

Befog: ADAMS, GIBBONS, AND HUNTER,

Circuit Judges

(Opinion filed: April 15, 1986)

MEMORANDUM OPINION OF THE COURT

GIBBONS, Circuit Judge

In No. 85-3494 Kenneth W. Behrend appeals from a summary judgment dismissing his complaint against an Assistant United States Attorney on grounds of official immunity. In No. 85-3495 Kenneth W. Behrend and Elizabeth M. Behrend appeal from a summary judgment dismissing their complaint against a United States District Judge on grounds of judicial immunity.

Mr. Behrend is an attorney. This round of litigation is a further manifestation of his dissatisfaction with a settlement by his former clients, Alton and Karen Godwin, of their Federal Tort Claims Act suit against the Veterans Administration. In Godwin v. Schramm, 731 F.2d 153 (3d Cir.), cert. denied, 105 S.Ct. 250 (1984), this court rejected Behrend's contention that the district court should have awarded him higher attorneys fees and costs. In Godwin v. Schramm, No. 84-3008 (3d Cir. Sept 26, 1985) this court affirmed the denial of Behrend's motion for relief from the judgment fixing the amount of his fees. Finding that appeal to be frivolous, we awarded double costs to the appellees.

The instant lawsuits are against the Assistant United States Attorney who negotiated the settlement on behalf of the

United States, and against the district court judge in whose court case was pending. Behrend alleges that the Assistant United States Attorney, by encouraging the Godwins to accept a structured settlement rather than going to trial, interfered with the contractual relationship between him and his clients. He alleges that the district judge, in encouraging the Godwins to accept the proposed structured settlement, interfered with his contractual relationship with his clients, intentionally inflicted emotional distress, and made fraudulent representations, causing loss to him and loss of consortium to his wife.

The district court held that summary judgment in favor of the Assistant United States Attorney was required by the doctrine of official immunity. See Barr v. Matteo, 360 U.S. 564 (1959). Clearly

an Assistant United States Attorney handling the defense of a Federal Tort Claims Act case must exercise discretionary judgment with respect to the negotiations of a settlement. All the acts complained of are within the outer limits of the attorney's official duties. Thus summary judgment on grounds of official immunity was proper. See Araujo v. Welch, 742 F.2d 802, 804-5 (3d Cir. 1984)

The district court held that summary judgment in favor of the judge was required by the doctrine of judicial immunity. See Bradley v. Fisher 80 U.S. (13 Wall.) 335 (1871). Behrend contends that participating in settlement negotiations and advising litigants about the wisdom of accepting a settlement offer are matters clearly outside the judge's jurisdiction. See Stump v. Sparkman 435,

U.S. 349 (1978). Clearly that is not the case. See Pennwalt Corp. v. Plough, Inc. 676 F.2d 77, 80 (3d Cir. 1982) Thus, summary judgment on grounds of judicial immunity was proper.

The Assistant United States Attorney who has represented the defendants requests an award of just damages and double costs pursuant to Federal Rule of Appellate Procedure 38 because these appeals are patently frivolous and vexatious. We agree that they are frivolous, but we will award the United States only single costs and reasonable attorneys fees. An affidavit of services shall be filed with this court within ten days of the date of our judgment specifying time expended and the reasonable value thereof. If the Behrends desire to contest either the time expended or the reasonable value thereof they may

serve and file opposing papers within ten days after service upon them of the affidavit of services.

TO THE CLERK OF COURT:

Kindly file the foregoing Memorandum Opinion.

_____
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALTON GODWIN and KAREN GODWIN, his wife,	)
Plaintiffs,	)
v.	)
UNITED STATES OF AMERICA,	)
Defendant and Third Party Plaintiff,	)
v.	)
EYE AND EAR HOSPITAL, DALE McMURDO, FRANK KAISER, HOWARD F. ARMOUR,	)
Third Party Defendants	)

O P I N I O N

ZIEGLER, District Judge

Pending before this court is the motion of Kenneth W. Behrend (hereinafter referred to as counsel) for reconsideration of the order of this court dated December 15, 1981, in which

counsel's fee was limited to the sum of $281,250.00. Counsel urges this court to award fees in the sum of $522,750. Counsel also has filed a motion for an award of costs in the sum of $62,015.19. Consistent with counsel's conduct throughout this litigation, he filed a notice of appeal 90 minutes after filing the motion for reconsideration. Since the motion of the United States to confirm the settlement, and counsel's motions, were filed prior to the notice, and because all pending motions relate to the order of December 15, 1982, we have jurisdiction to resolve these matters. In the event we have no jurisdiction, we write separately to explain the order of December 15, 1982.

We hold that Kenneth W. Behrend and the law firm of Behrend, Aronson and Morrow are limited to the sum of $281,250.00 for services rendered. We

also hold that the motion for costs in the sum of $62,015.19 must be denied for contractual reasons and because counsel intentionally attempted to charge an illegal fee.

A. History of Case

Alton and Karen Godwin filed a civil action for money damages predicated on the Federal Tort Claims Act. Pennsylvania substantive law is controlling. The United States impleaded various third-party defendants and the third-party action was severed for trial. Evidence was presented and the court articulated findings of fact and conclusions of law on December 23, 1982. Resolution of post-trial relief is pending. Judgment has not been entered.

On December 15, 1982, plaintiffs agreed to settle their claim against the United States for the sum of

$1,125,000,00. The United States agreed to continue to provide medical care and treatment to Alton Godwin for life. The motion for reconsideration is based on counsel's post-settlement contention that he is entitled to a pre-determined fee based not only on the cash paid by the United States but also on "the average value of the medical care to be provided, which averages $4,830,000." Counsel computes the fee to be $522,750.00.

We begin our discussion by noting that the only power of attorney of record, dated November 18, 1980, provides that counsel shall receive 40 percent of any recovery. The contract contains no provisions that counsel shall be paid a percentage of the medical care to be rendered following a settlement. Moreover, the agreement violates the mandate of Congress that "no attorney

shall charge, demand, receive or collect for services rendered fees in excess of 25 per centum for any judgment rendered pursuant to section 1345(b) of this title ... "28 U.S.C. 2678. Hence, we find that the power of attorney is void, or at least voidable by plaintiffs, because it violates public policy.

The record also reveals that the document was prepared when counsel knew that the plaintiffs' claim, at least in part, would be against the United States. This is established by the time records of the law firm which indicate that on August 13, 1980, counsel referred to the claim as Godwin v. United States and Children's Hospital. Nevertheless counsel prepared the power of attorney calling for a 40% fee against another entity; failed to mention the United States or the statute of Congress; and failed to obtain an

executed power of attorney to represent plaintiffs against the United States, or it agents, at any time thereafter.

On August 3, 1981, counsel notified plaintiffs that the fee would be limited to 25 percent but the letter is disingenuous because it implies that the reduction was occasioned by the value of the case, rather than the requirement of federal law. More importantly, counsel never advised the clients that he was claiming a fee based on "the average value of medical care to be provided."

On September 1, September 7, and November 19, 1982, the court conducted conciliation conferences in an effort to resolve the action prior to trial. The United States offered $1,125,000.00 in cash and the Veterans Administration agreed to continue to provide medical care to Alton Godwin but no separate fund

was established for this purpose.

In response to this offer, counsel prepared a "Settlement Sheet," dated November 16, 1982, and Alton Godwin signed the document while hospitalized. Counsel calculated the value of settlement at $2,091,000.00 and directed that he was entitled to $522,750.00. The sum of $2,091,000.00 was obtained by estimating "the average value of the medical care to be provided, determined to be $3,220,000.00 to $6,440,000.00, which averages $4,830,000.00 ... Twenty percent of $4,830,000.00 is $966,000.00. This figure was then added to the cash offer of the United States of $1,125,000.00 to generate the figure of $2,091,000.00 "to be received in settlement." Thus for fees and costs, counsel would receive the sum of $522,750.00 from available cash and the clients would receive the sum of

Counsel agreed to receive this sum on the following basis: $350,000.00 at the time of settlement for services rendered; an estimated $60,000.00 at the time of settlement for expenses; and $28,791.66 in six annual installments ending in January, 1989. If the foregoing calculations appear abstruse, imagine the plight of Alton and Karen Godwin. Indeed, in 10 years of public service and 22 years at the bar, this court has never encountered a more egregious example of overreaching by a lawyer.

B. Was There A Contract?

As we have found, the only power of attorney of record violates public policy. It is either void or voidable by plaintiffs, at least to the extent that the fee exceeds the statutory limit. Some courts have held that such a contract is void ab initio and totally unenforceable.

Gramby v. Cobb, 422 A. 2d 899, 282 Pa. Super. 183 (1980). In addition, as we have noted, neither the United States nor its agents are mentioned in the document.

The letter of August 3, 1981, may constitute an offer to represent plaintiffs against the United States but counsel has failed to prove the terms of acceptance, despite the affidavits of record in response to our order of December 15, 1982. Thus, when counsel presented the settlement sheet to the clients, he either had no contract of employment at all, or no contractual basis to assert a fee based on the medical care to be provided in the future.

The settlement sheet is no better. It is not an enforceable contract because it lacks valuable consideration. It is a mere declaration of intention, a gratuitous promise at most, that the

signers will distribute funds in a particular manner. We find that counsel has no contractual basis to contend that plaintiffs must pay a fee based on "the average value of the medical care to be provided, determined to be $3,220,000.00 to $6,440,000.00, which averages $4,830,000.00."

C. The Settlement Sheet

Assuming for the sake of discussion that the settlement sheet constitutes a contract, we hold that (a) it is unenforceable on grounds of public policy; (b) it is illegal; and (c) it was obtained in violation of DR 2-106(A) of the Code of Professional Responsibility.

We are mindful that a contract between a client and a lawyer is a private matter so long as the agreement does not violate public policy. A contract to pursue a claim under the Federal Tort

Claims Act is no exception. Congress removed the discretion of the disrict courts to adjudicate fees when it amended the act in 1966. However, federal courts retain the power to enforce the statutory limits imposed by law, and to monitor the contracts of counsel, Dunn v. H. K. Porter Co., 602 F. 2d 432, 1108-1109 (3d Cir. 1979).

The settlement sheet is unenforceable as a matter of policy because it grants to counsel a predetermined fee based on a disputed and indeterminable amount. The value of future care depends on such variables as the length of Alton Godwin's life; the nature of the medical services; the length of any hospitalizations; and the cost of care provided by the Veterans Administration. The expense will vary from year to year and counsel has no reasonable basis to

assert what the value may be.

The cases cited by counsel are inapposite because in each instance those courts made findings as to life expectancy and future medical costs. Judgments were entered. Here there are no findings because there was no trial. No judgment was entered on plaintiffs' claim and the settlement offer by the United States did not include a specific fund for the payment of medical expenses. Moreover, the pre-trial statements of the parties indicate a substantial disagreement concerning the life expectancy of Alton Godwin. Thus, to award counsel a pre-determined fee, under these circumstances, is tantamount to awarding a fee for benefits that cannot be calculated and may never be paid.

Counsel's proposed fee represents 46 percent of the cash received by

plaintiffs and the precise sum of $522,750.00 was determined at the time of settlement. It is therefore not significant that $350,000.00 was to received at settlement and the balance in six annual installments. Plaintiffs' obligation and the amount thereof were determined.

Counsel attempts to justify the fee by arguing that he negotiated and obtained a future benefit for his clients. The argument is specious. First, plaintiffs will receive those benefits to which they are entitled whether they retained counsel or not. The Veterans Administration provided medical care for two and one-half years before the settlement and for seven months before counsel secured a power of attorney. The promise to continue such care in the future bears little relation to counsel's efforts.

More importantly, the predetermined fee based on the estimated value of future medical expenses is excessive and therefore illegal even if we assume arguendo that counsel negotiated for the payment of future medical expenses by the Veterans Administration. It is illegal because 25 percent of an unknown is zero.

We express no opinion on the question of whether a lawyer may secure a power of attorney that provides for the payment of a percentage, not to exceed 25 percent, of the medical expenses when they are paid on an annual basis in the future. That question turns on (1) whether the lawyer has obtained a benefit for a veteran that would not have been paid otherwise, and (2) whether the concept is violative of unique protection that Congress has granted to veterans.

Congress has enacted a statute, for

example, restricting an attorney to a fee of $10.00 to represent a veteran in a claim for monetary benefits against the Veterans Administration. 38 U.S.C. 3402(c)(2). The language used by the Supreme Court with regard to that statute is instructive:

> Congress, clearly intended to protect all veterans, competent and incompetent, in all courts, State and Federal, against the imposition or payment of fees in excess of the amount fixed by statute.

Hines v. Lowery, 305 U.S. 85, 90 (1938); see also Hoffmaster v. Veterans Administration, 444 F. 2d 192 (3d Cir. 1971).

Thus it is likely that the courts would proscribe for policy reasons a power of attorney in which a veteran has agreed to pay a lawyer a fee based on a percentage of the medical expenses when paid in the future for policy reasons

has negotiated such an arrangement. A question not here presented.

We hold that, assuming the settlement sheet constitutes a contract, the requirement that Alton and Karen Godwin pay to counsel a fee representing 46 percent of the cash paid at settlement is excessive and illegal under the Federal Tort Claims Act.

D. Illegality

The doctrine of illegality provides that an agreement will not be enforced when it cannot be performed without violation of a statute. A contract is illegal "if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy." RESTATEMENT OF CONTRACTS 512 (1932); RESTATEMENT (Second) OF CONTRACTS 179 (1979). As we have noted, the three documents of record on which counsel

relies are illegal and unenforceable because, as rehearsed, they are contrary to the clear directive of Congress.

The power of attorney dated November 18, 1980, is illegal on its face. The letter of August 3, 1981, arguably constitutes an offer to contract but it makes no mention of a fee based on future medical benefits and if it did, it too would be illegal under these circumstances. We reject the argument that the words "25% of the total recovery" somehow authorizes counsel to violate federal positive law by contract. Finally, the settlement sheet is not a contract, but if it is, we hold that the contract is illegal for the reasons previously discussed, and will not be enforced.

E. The Conduct of Counsel

This is a sad case. The sadness

began on March 25, 1980, and continues for the Godwins. Fortunately the United States proposed a settlement that is tailored to meet the needs of Alton Godwin. What troubles this court is the conduct of counsel.

That conduct permits the conclusion that counsel opposed the settlement of the case, not because the offer was unreasonable, but because a large fee was in jeopardy if plaintiffs accepted the offer. When the Godwins indicated a willingness to accept, counsel prepared the settlement sheet of November 16, 1982, to attempt to salvage a fee that the offer had placed in jeopardy.

The power of attorney of November 18, 1980, and the letter of August 3, 1981, make no mention of charging a fee for future medical benefits, although counsel was pleased to inform his clients

"that there is no fee that will be charged on the pension fund claim" A waiver of $10.00 we might add! It is unconscionable, in our judgment, to have prepared the settlement sheet when settlement was imminent, and then use that document as the basis for an additional fee of $241,500.00 against these plaintiffs.

Counsel knows the difference between a power of attorney and a settlement sheet because he lectured a lawyer from Ohio on the former in a letter of record dated August 11, 1980. A power of attorney is a contract. A settlement sheet is not. Since counsel did not have an enforceable power of attorney when this case was settled, we turn to the appropriate relief.

F. Relief

The motion of Kenneth W. Behrend

and the law firm of Behrend, Aronson and Morrow for counsel fees in the sum of $522,750.00 will be denied. We will enforce the terms of counsel's offer, set forth in his letter of August 3, 1981, and limit him to 25 percent of total recovery which we find to be $1,125,000.00. Counsel is entitled to $281,250.00 for counsel fees and services rendered.

We find this sum to be generous in view of the caliber of representation in this case. The case was settled not because of the assiduous efforts of counsel but the nature of the injuries. Indeed, many of the substantive legal concepts, and most of the rules of procedure, seemed beyond the grasp of counsel. If this were a statutory fee case, we would reduce the lodestar.

A few example will suffice. First, counsel filed suit in the wrong court.

Second, he sued the wrong defendant. Third, he filed a frivolous motion for equitable relief. Fourth, he filed a second claim against the United States involving the same parties and facts while this case was pending. Fifth, he filed a third claim against the United States on behalf of plaintiffs' children arising out of the operative facts, although Pennsylvania law is to the contrary. Sixth, he urged this court to follow the decision of a county court in Ohio as precedent for overruling Pennsylvania substantive law, despite the fact that the case has no precedential value. Seventh, he appeared at a pre-trial conference with articles from medical journals and treatises which he proposed to read into evidence. Eighth, he filed notices of depositions in violation of Federal Rule 26 and cited as authority the Pennsylvania

Rules of Civil Procedure. And ninth, he failed to file suit in federal court against diverse parties and consolidate those cases with the instant case for trial, once the instant action was removed, to permit adjudication of all claims and prevent the defense of issue preclusion. There is more but further recitation is unnecessary.

We also find that, since counsel failed to include any provision for reimbursement of costs in his offer to enter an implied contract of employment dated August 3, 1981, we are required to enforce the terms of the bargain he proposed, and deny any claim for costs incurred in representing any member of the Godwin family in this litigation. Our decision is compelled not only by contractual principles but also by the supervisory power of the court to protect

clients from unfairness, overreaching and unprofessional conduct by counsel. We believe that denial of costs and expenses is an appropriate sanction for a lawyer who intentionally attempts to extract an illegal fee from a person to whom Congress and the Supreme Court have afforded special consideration. Counsel's claim for costs in the sum of $62,015.19 will be denied.

Finally, plaintiffs expressed concern at a recent conference concerning the intentions of counsel following the settlement. He has been discharged as their lawyer and therefore this court orders counsel and the law firm to refrain from pressing any claim or demand in any court, Federal or State, against plaintiffs for any fee, expense or cost unless otherwise authorized by this court.

The civil actions filed by

plaintiffs in this and any other court actions against any defendant shall be marked discontinued with prejudice on motion of any defendant by virtue of the settlement and in accordance with the Stipulation for Compromise Settlement. A written order will follow.

DATED: January 18, 1982

Donald E. Ziegler